STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v DANIEL MARTINEZ-CABALLARO, Defendant-Appellant.	No. 257461 Eaton Circuit Court LC No. 04-020031-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARIO MARTINEZ-SANTACRUZ, Defendant-Appellant.	No. 257659 Eaton Circuit Court LC No. 04-020033-FC

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

In these consolidated appeals, defendants both appeal as of right from their respective jury convictions of first-degree home invasion, MCL 750.110a(2), kidnapping, MCL 750.349, and first-degree felony murder, MCL 750.316(b). Defendant Daniel Martinez-Caballaro (Caballaro) was sentenced to 75 to 240 months' imprisonment for first-degree home invasion, 135 to 360 months' imprisonment for kidnapping, and life imprisonment without parole for felony murder. Defendant Mario Marinez-Santacruz (Santacruz) was sentenced to 95 to 240 months' imprisonment for first-degree home invasion, 135 to 360 months' imprisonment for kidnapping, and life imprisonment without parole for felony murder. We affirm both defendants' convictions of felony murder and home invasion, but vacate their kidnapping convictions.

Santacruz is Caballaro's son, and the decedent was Caballaro's nephew by marriage. On November 3, 2003, Obdulia Santacruz-DeMartinez, who is defendant Caballaro's wife and defendant Santacruz's mother, left their home in Detroit and moved in with the decedent in Lansing. Both defendants believed that Obdulia was having an affair with the decedent. They

drove to Lansing, where they entered the decedent's apartment and forced the decedent and Obdulia into the back of a pickup truck with them. While another person began driving the truck, a struggle ensued. During the struggle, defendant Santacruz stabbed the decedent eight times, killing him.

I. Defendant Martinez-Caballaro

Caballaro argues that his trial counsel was ineffective for failing to request a jury instruction that legally adequate provocation negates malice and for failing to object to an allegedly confusing jury instruction regarding the intent necessary to convict him of felony murder. We disagree.

Whether trial counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Id*. Trial counsel is presumed to have been effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove otherwise, defendant must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms, and he must show that this performance so prejudiced him that he was deprived of a fair trial. *Id*., 687-689. To establish prejudice, a defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Caballaro argues that a rational view of the evidence shows that he acted in a heat of passion. Caballaro was tried as an aider and abettor to open murder. "[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Hawthorne*, 265 Mich App 47, 58; 692 NW2d 879 (2005). Similarly, an aider and abettor to murder is entitled to an instruction on voluntary manslaughter if a rational view of the evidence supports such an instruction. See *People v Folkes*, 71 Mich App 95, 98; 246 NW2d 403 (1976); see also LaFave, Criminal Law, § 13.2(c), p 347 (2003) ("because a killing in the heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder"). "The elements of voluntary manslaughter are (1) that the defendant killed in the heat of passion, (2) that the passion was caused by adequate provocation, and (3) there was not a lapse of time during which a reasonable person could have controlled his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Adequate provocation is "that which would cause a reasonable person to lose control." *Id*.

According to both defendants' testimony, they were aware of Obdulia's relationship with the decedent at least one week prior to the incident. Caballaro testified that he went to Lansing for the purpose of retrieving her from the house he knew that she shared with the decedent. The sight of her with the decedent could not have been unexpected and would not cause a reasonable person to act out of passion rather then reason. Presuming defendant's passions where aroused at the sight of his wife, Caballaro helped remove the decedent from the house and rode for a time in the back of the truck with the decedent before the stabbing. A reasonable person could have controlled his passion in that time. The evidence cannot rationally support the proposition that defendant acted in the heat of passion. Counsel cannot be faulted for failing to make a meritless request. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Next, Caballaro argues that defense counsel was ineffective for failing to object to a jury instruction that allegedly was confusing and allowed the jury to conclude that it could convict defendant of felony murder merely by finding that he possessed the intent to commit the underlying felony. We review jury instructions as a whole to determine whether "they fairly present the issues for trial and sufficiently protect the defendant's rights." *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

We find that the jury instructions properly informed the jury of the intent necessary to convict defendant of felony murder. Caballaro contends that the trial court's reading of CJI2d 16.4(7) was confusing. Immediately thereafter, the trial court read CJI2d 16.26, which included specific language instructing the jury that "[i]t is not enough merely to find that the defendants agreed to commit the crime of home invasion and kidnapping. . . . you must determine as to each defendant separately whether he intended to kill, whether he intended to do great bodily harm, or whether he created a very high risk of death or great bodily harm knowing that death or such harm was the probable result of what he did." The instructions fairly presented the issues at trial and adequately informed the jury that the intent necessary to convict defendant Caballaro of felony murder was more than the intent to commit kidnapping or home invasion. Defense counsel's failure to object to the allegedly confusing instructions did not fall below an objective standard of reasonableness.

II. Defendant Martinez-Santacruz

Santacruz argues that his written, custodial confesion to the police was inadmissible because he was informed of his *Miranda*[1] rights before being taken into custody and not subsequently readvised. We disagree.

Because defendant did not preserve his argument for appeal, review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A *Miranda* warning is required whenever a person is interrogated by police while in custody. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). However, the police are not required to read *Miranda* rights during every subsequent interrogation; rather, the only question is whether under the totality of the circumstances the subsequent statement was voluntary. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992); *People v Godboldo*, 158 Mich App 603, 606; 405 NW2d 114 (1986).

Santacruz was initially interviewed in his apartment, where he was immediately advised of his rights when he began to incriminate himself. Santacruz then waived those rights, admitted that he killed the decedent, and took officers to the decedent's body. The officers then took

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Santacruz to the police station, where he acknowledged that he had been advised of his rights earlier and provided the written confession. An officer's obligation to give Miranda warnings to an accused attaches only when the person is subject to custodial interrogation. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). However, "the *Miranda* rights are not a liturgy which must be read each time a defendant is questioned." *Godboldo*, *supra* at 605. We are persuaded that it would be elevating form over function to conclude that a precustodial *Miranda* warning is *per se* ineffective. See *State v Tolbert*, 381 Md 539, 550-551; 580 A2d 1192 (2004). See also *People v Pena*, 72 F3d 767, 769 (CA 9, 1995) (concluding a precustodial *Miranda* warning given fifteen hours prior to defendant's actual custody was effective and that the lapse in time, not custodial status, was the determining factor).

Santacruz next argues that his written confession was inadmissible because it was hearsay and because the officer who translated it was not qualified. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *McLaughlin*, *supra* at 651. A defendant's out-of-court statements are not hearsay. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Here, the officer who took defendant's written confession at the police station translated it from Spanish into English on the night that defendant gave his statement, and the same officer read that translation into the record at trial. The officer can testify regarding defendant's confession because he had personal knowledge of its content without help from an interpreter since he heard it himself in Spanish. The accuracy of the translation and the degree of the officer's fluency in Spanish go to the weight and relevancy of evidence. However, we note that the record indicates that the officer is fluent in Spanish and frequently translated for Spanish-speaking citizens as a police officer. Additionally, defendant had the opportunity to cross-examine the officer on the accuracy of his translation and challenged the translation of a single phrase. The confession was defendant's own statement, and we cannot find the officer's translation was so questionable or inaccurate as to deem the confession irrelevant and inadmissible.

Santacruz next agues that defense counsel was ineffective for failing to request a jury instruction on the defense of others. We disagree.

A defendant who is the aggressor is not entitled to claim self-defense or defense of others unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Here, Santacruz was the initial aggressor, and there is no evidence that he withdrew or communicated his withdrawal to the decedent. The decedent was imprisoned at knife point against his will in the back of a truck with both defendants. Any defensive actions on the part of the decedent under these circumstances do not allow the defendant to claim defense of himself or of Caballaro. Santacruz testified that the decedent momentarily gained possession of the knife and threatened Caballaro, but Santacruz regained the knife and then stabbed the decedent eight times. Even if the decedent's possession of the knife allowed defendant to take defensive action, any threat posed by the decedent was removed when Santacruz regained the knife and did not call for stabbing the decedent eight times. Defense counsel was not ineffective in failing to make a meritless request for a defense of others instruction.

Finally, Santacruz argues that his convictions of kidnapping and home invasion should be vacated because they violated double jeopardy by imposing separate sentences for felony murder and the underlying felony. We agree that his kidnapping conviction should be vacated.

We review unpreserved claims of double jeopardy for plain error. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004); *Carines*, *supra* at 763-764. A defendant may not be placed in double jeopardy by being convicted and sentenced for felony murder and for the underlying felony. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). When the defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony. *Id*.

The trial court initially instructed the jury to find that defendants were "committing a home invasion *and* kidnapping" (emphasis added) to find them guilty of felony murder. Both home invasion and kidnapping are enumerated predicate felonies for felony murder, but only one of them is required. MCL 750.316(1)(b). However, this error did not prejudice defendant. *Carines*, *supra* at 763. First, the trial court corrected itself and informed the jury before it retired that they should not consider home invasion as a predicate felony for felony murder. Second, the undisputed facts in this case show that the killing did not take place until well after the home invasion was completed. Home invasion could not have been a predicate felony here, so it does not raise a potential double jeopardy issue.

The evidence indicated that both the decedent and Obdulia had been kidnapped. The trial court specifically instructed the jury that defendant could be found guilty of kidnapping only if it concluded that he kidnapped *the decedent* without reference to Obdulia. The court then went on to instruct the jury that defendant could be found guilty of felony murder if it found that defendant murdered the decedent while the defendant was committing a kidnapping, without reference to either the decedent or Obdulia. To avoid double jeopardy the jury would have been required to predicate felony murder on the kidnapping of Obdulia. The jury instructions precluded the jury from doing so. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). There is no double jeopardy violation when the underlying felony and felony murder convictions are based on different victims. *People v Wilson*, 242 Mich App 350, 360-362; 619 NW2d 413 (2000). However, we will not uphold a kidnapping conviction against defendant based on the kidnapping of Obdulia when the jury clearly did not reach such a conclusion. Accordingly, because defendant Santacruz was erroneously convicted of both felony murder and the underlying felony his conviction and sentence for kidnapping must be vacated. *Coomer*, *supra* at 224.

This analysis is equally applicable to defendant Caballaro's conviction and sentence for kidnapping. Although defendant Caballaro has not raised this double jeopardy issue on appeal, his conviction and sentence for kidnapping constitutes plain error apparent on the record that affects his substantial rights, *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002), and the conviction and sentence should be vacated to preserve the integrity of the judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 54 US 36; 124 S Ct 1354; 158 LE2d 177 (2004).

Affirmed in part, vacated in part, and remanded for modification of the judgment of sentence. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis